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| 07/471-287 | 01/26/90 | BROOKS | 6 STIM1000 |

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| EXAMINER | |
| HENLEY III, R | |
| ART UNIT | PAPER NUMBER |
| 1205 | /3 |
| DATE MAILED: | |

Below is a communication from the EXAMINER in charge of this application

COMMISSIONER OF PATENTS AND TRADEMARKS

10/08/92

ADVISORY ACTION

THE PERIOD FOR RESPONSE:

is extended to run 5 months from the date of the Final Rejection

continues to run _____ from the date of the Final Rejection

expires three months from the date of the final rejection or as of the mailing date of this Advisory Action, whichever is later. In no event however, will the statutory period for response expire later than six months from the date of the final rejection.

Any extension of time must be obtained by filing a petition under 37 CFR 1.136(a), the proposed response and the appropriate fee. The date on which the response, the petition, and the fee have been filed is the date of the response and also the date for the purposes of determining the period of extension and the corresponding amount of the fee. Any extension fee pursuant to 37 CFR 1.17 will be calculated from the date that the shortened statutory period for response expires as set forth above.

Appellant's Brief is due in accordance with 37 CFR 1.192(a).

Applicant's response to the final rejection, filed 9/16/92, has been considered with the following affect, but it is not deemed to place the application in condition for allowance:

1. The proposed amendments to the claim and/or specification will not be entered and the final rejection stands because:

- a. There is no convincing showing under 37 CFR 1.116(b) why the proposed amendment is necessary and was not earlier presented.
- b. They raise new issues that would require further consideration and/or search. (See Note).
- c. They raise the issue of new matter. (See Note).
- d. They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal.
- e. They present additional claims without cancelling a corresponding number of finally rejected claims.

NOTE: Respecting Kobek, Applicant's Amendments to claims 1 and 14 and the declaration of Dr. Brook would raise a new issue as to whether or not the proportioning of ingredients would have been obviously optimized given the teaching at column 4, lines 126 +

2. Newly proposed or amended claims _____ would be allowed if submitted in a separately filed amendment cancelling the non-allowable claims.

3. Upon the filing of an appeal, the proposed amendment will be will not be, entered and the status of the claims in this application would be as follows:

Allowed claims: NONE
Claims objected to: None
Claims rejected: 1-27

However:

- a. The rejection of claims _____ on references is deemed to be overcome by applicant's response.
- b. The rejection of claims _____ on non-reference grounds only is deemed to be overcome by applicant's response.

4. The affidavit, exhibit or request for reconsideration has been considered but does not overcome the rejection. *

5. The affidavit or exhibit will not be considered because applicant has not shown good and sufficient reasons why it was not earlier presented.

The proposed drawing correction has has not been approved by the examiner.

The proposed drawing correction has not been approved by the client.

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*Note Attachment

Frederick E. Waddell
Supervisory Patent Examiner
Group 120

Art Unit 1205

Attachment to Advisory Action

Respecting the arguments as to Millman not providing a motivation to the skilled artisan to include the lactate salts of Kober because of the dissolvable nature of the compositions described by Millman, such are not seen to diminish the propriety of the rejection. The skilled artisan would have been motivated to employ the lactate salts of Kober in the Millman composition because Kober teaches that these salts are not only physiologically acceptable, but also are readily soluble which are characteristics fully consistent with the requirements of Millman.

Respecting Dr. Brooks characterization of what the prior art taught about the use of lactates for nutritional supplements, this is not seen to be persuasive. While the references relied upon by the declarant point to lactic acid as a fatigue causing agent, other references previously supplied by applicant appear to speak to the contrary.

For example, Mazzeo et al. (BAE) at page 238, column 1, lines 1-2 highlight that "lactate appears to represent a significant fuel source sustaining physical activity".

Brooks (AAH) at lines 7-8 for the abstract at page 144 states that "during exercise, lactate represents a fuel source which is quantitatively more important than blood glucose".

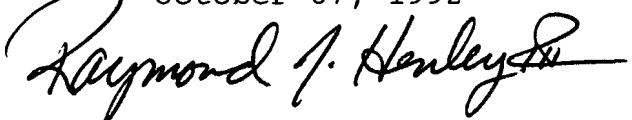
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Thus, declarant's position cannot be afforded the significance urged.

Respecting Adibi et al. and Kawajiri, it is maintained by applicant that unlike in In re Lintner, applicants use of lactic acid salts as a nutritional supplement is a clear departure from the prior art and that an obviousness rejection may be rebutted where a claimed composition is shown to possess unexpectedly superior properties or advantages as compared to prior art compositions. Such advantages are believed by applicant to be established by the Brooks declaration. However, as discussed above, the position of the declarant does not appear to be established by the prior art.

For these reasons , applicants arguments and the Brooks declaration are not believed to support a conclusion that the claimed subject matter is patentable over the prior art.

HENLEY:ebw
October 07, 1992



RAYMOND J. HENLEY III
PATENT EXAMINER
GROUP 120 - ART UNIT 125